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No. 93-1098

In The

Supreme Court of the United States

October Term, 1993

OUTBOARD MARINE CORPORATION,

Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE APPELLATE COURT'S REVERSAL OF PARTIAL SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS ON GROUNDS THAT STATE LAW RATHER THAN ADMIRALTY LAW APPLIED IS A FINAL JUDGMENT.

II. WHETHER FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS.

III. WHETHER NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION.

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OBJECTION TO JURISDICTION

The judgment which petitioner seeks review of by petition for writ of certiorari is not a final judgment, because it ordered reversal of the partial summary judgment entered by the trial court and remanded the case for further proceedings.

28 U.S.C. § 1257(a) confers upon the United States Supreme Court jurisdiction to review only final judgments rendered by the highest court of a State in which a decision could be had by writ of certiorari. The judgment herein lacks finality. Consequently, there is no jurisdiction to review.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1257. STATE COURTS; CERTIORARI

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

ARGUMENT

I. THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW THE STATE APPELLATE COURT'S REVERSAL OF PARTIAL SUMMARY JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS ON GROUNDS THAT STATE LAW RATHER THAN ADMIRALTY LAW APPLIED BECAUSE IT IS NOT A FINAL JUDGMENT.

The judgment which petitioner seeks to have reviewed does not meet the jurisdictional requirements of 28 U.S.C. § 1257 in two respects.

First, the judgment lacks finality. This is because it does not completely resolve all issues involved in the controversy and does not terminate the litigation. The Illinois Court of Appeal's opinion held state law rather than admiralty law applied to a wrongful death products liability action, which occurred in navigable waters off a pleasure boat. The Appellate Court reversed the trial court's grant of partial summary judgment and remanded the case for further proceedings.

28 U.S.C. § 1257 limits Supreme Court review of state court judgments to final judgments rendered by the highest court of the state in which a decision could be had. The finality requirement serves several purposes:

> (1) it avoids piecemeal review of State Court judgments; (2) it avoids giving opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of State Court determination of federal constitutional issues to leave at a minimum federal intrusion in State affairs. *North Dakota State Board of Pharmacy v.*

Snyder's Drug Stores, Inc., 414 U.S. 156, 158 (1973).

Clearly, the judgment of reversal and remand in this case is not final because there are further proceedings to be conducted in the state court on the merits of the case. Review at this juncture would conflict with the intended purpose of the statute.

This Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) defined four categories of exceptions to the finality requirement, and petitioner has asserted in its jurisdictional statement that this case falls within the exceptions. It has claimed the federal question has been finally decided by the Illinois state courts, that if it prevails on non-federal grounds, this Court will not have another opportunity to review the federal case, that a reversal by this Court would preclude further litigation on claims for recovery on behalf of the survivors and that the constitutionally based policy of uniformity of maritime law would be eroded. (Pet., p. 2)

Respondent disputes those claims. A careful examination of *Cox* and subsequent case law leads to the conclusion that the exceptions set out in *Cox* do not apply to the instant case, and therefore this Court is without jurisdiction to review the issues presented by petitioner at this time.

Petitioner Outboard Marine Corporation's (OMC) claim that the federal question has been decided is only partially correct. The issue of whether maritime or state law applied to this state court cause of action has been ruled on by the state appellate court. However, the loss of

society damages question has not been addressed by the state appellate court.

Moreover OMC omits any mention of additional federal issues being raised. This is a critical omission because the *Cox* exception that an order is final if the federal issue is resolved even though other proceedings remain will not apply if the remaining issues give rise to any other federal issues. *Flynt v. Ohio*, 451 U.S. 617, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981); *Asarco, Inc. v. Kadish*, 490 U.S. 607, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

In the underlying state court complaint, plaintiff has alleged that defendant was negligent for designing and manufacturing the outboard boat motor without a propeller guard. (Pet. A-22-28). An issue of federal preemption involving the Federal Boat Safety Act, 46 U.S.C. § 4306, 4307 is likely to arise in the remaining state court proceedings. Thus, the potential for piece meal review exists, which can be avoided if review of the question presented by petitioner is denied at the present time.

Second, the fact that there will not be another opportunity to review the question presented if petitioner prevails on the merits on non-federal grounds does not qualify the case as a *Cox* exception to finality. *Castarelli v. Massachusetts*, 421 U.S. 193 (1975). It applies only where subsequent review is impossible, regardless of the ultimate outcome of the case. *Cox*, 420 U.S. at 482. Here, if petitioner does not prevail in the subsequent proceedings, it will have the opportunity to seek review on the federal issue.

As for OMC's final claim, namely that the constitutionally based policy of uniformity in maritime law could

be eroded, if the decision is not reversed, the substance of this issue of uniformity is addressed under Points II and III of this brief. The decision of the state appellate court does not erode uniformity of maritime law. The court appropriately applied the two pronged test of admiralty jurisdiction originally established by this Court in *Executive Jet Aviation*, 409 U.S. 249 (1972) and concluded the requisite nexus to traditional maritime activity was absent.

The cases cited by the *Cox* Court in which this exception has been invoked are distinguishable from the instant case. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) involved a freedom of the press "chilling effect situation", and in *Construction Laborers v. Curry*, 371 U.S. 542 (1963), the decision to take jurisdiction relied in part on the fact that the litigation was concluded as a practical matter because the petitioner had no other defenses to the injunction which had been authorized by the state court.

The second respect in which the jurisdictional requirement of 28 U.S.C. § 1257 has not been met concerns the second issue raised by OMC, which is whether loss of society damages are recoverable under general maritime law.

Assuming arguendo, that this Court accepts jurisdiction of the admiralty versus state law issue, the damage question still cannot be reviewed because it is not a decision of the highest court in the state which could be had.

The intermediate state appellate court did not address this issue and there is no way of knowing how

the Illinois Appellate Court or Illinois Supreme Court would rule. This Court has previously refused jurisdiction over issues which were not reached by the state court on the grounds of prematurity. *California v. Rooney*, 483 U.S. 307 (1987); *Perry v. Thomas*, 482 U.S. 483 (1987). Review of this issue on recoverable damages under general maritime law at this time would be premature. To grant certiorari on the admiralty law question alone would inevitably lead to piece meal review. The statute and its underlying policy considerations compel a denial ~~of the~~ petition for writ of certiorari.

II. THE APPELLATE COURT HOLDING THAT STATE LAW RATHER THAN FEDERAL MARITIME LAW APPLIES TO A PRODUCT LIABILITY ACTION ARISING OUT OF THE DEATH OF A PASSENGER THROWN FROM AND STRUCK BY A RECREATIONAL BOAT ON NAVIGABLE WATERS DOES NOT CONTRAVENE SUPREME COURT PRECEDENT.

The state court appellate opinion in this case properly set forth and applied the test for invoking admiralty jurisdiction (Pet. A-1-7). Three United States Supreme Court decisions established and refined this two pronged test. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) required first a determination of whether the tort occurred in navigable waters and if so, then a determination whether there was a significant relationship between the wrong and traditional maritime activity.

Foremost Insurance Corp. v. Richardson, 457 U.S. 668 (1982) expanded admiralty jurisdiction beyond commercial vessels by holding a collision of two pleasure boats

did bear a significant relationship to traditional maritime activity. And, in *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court concluded a yacht docked at a marina which was destroyed by fire was subject to admiralty jurisdiction in that a substantial relationship to traditional maritime activities existed because the fire had "a potentially disruptive impact on maritime commerce." *Sisson*, 497 U.S. at 363.

It is undisputed that incidents resulting in injuries from pleasure boats are not automatically outside the realm of admiralty jurisdiction simply because they are noncommercial. However, these three cases do not purport to hold all incidents involving pleasure vessels in navigable waters bear a significant relationship to traditional maritime activity.

Admiralty jurisdiction determinations necessarily must be made on a case by case basis. OMC incorrectly alleges the state appellate decision contravenes established Supreme Court precedent and ignores the overwhelming authority supporting admiralty jurisdiction. Clearly, the state court followed the dictates of the United States Supreme Court (See Opinion, Pet. A-1-7). In doing so, it analyzed the precise activity and conduct involved and relied on *Delta Country Ventures, Inc. v. Maganu*, 986 F.2d 1260 (9th Cir. 1993) and *Kunreuther v. Outboard Marine Corp.*, 715 F.Supp. 1304 (E.D. Pa. 1989) in support of its ruling.

Kunreuther v. Outboard Marine Corp., 757 F.Supp. 633 (E.D. Pa. 1991), it held state law and not admiralty law applied to a case alleging a failure to design and equip outboard motors with propeller guards because it did not

bear a significant relationship to traditional maritime activity[1].

With respect to *Maganu*, the Ninth Circuit held that because the underlying purpose of admiralty jurisdiction is the protection of commercial shipping, not every accident in navigable waters that could disrupt maritime commerce would invoke admiralty jurisdiction. The appellate court reasonably concluded that being a passenger in a pleasure boat in an area of the Mississippi River that is used for recreational boating constituted aquatic recreation involving a pleasure boat analogous to the diving or "aquatic recreation off a pleasure boat", in *Maganu*.

While negligent navigation is not a prerequisite to admiralty jurisdiction, it is more likely to trigger that disruptive impact to traditional maritime activity than the factual situation presented in the case at bar and therefore is significant. See *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) where admiralty jurisdiction was invoked only because excessive speed and a failure to secure a pleasure boat resulted in a passenger's injury. The Court stated this was a navigational error.

OMC has cited *St. Hilaire Maye v. Henderson*, 469 F.2d 973 (8th Cir. 1974) as a case with similar facts holding admiralty jurisdiction applied. Yet, this case, was decided before *Sisson*. And, although *Complaint of Bird*, 794 F.Supp. 575 (D.S.C. 1992) found admiralty jurisdiction

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[1] The opinion was later withdrawn on other grounds, i.e. that Death on The High Seas Act applied to the case.

applied where a passenger was pushed overboard, it is not a products case.

The more recent cases relied on by defendant, *Anderson v. Whittaker Corp.*, 692 F.Supp. 764 (W.D. Mich. 1988) and *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 800 F.Supp. 1061 (D.Conn. 1992), for example, involved product defects which, in the case of the former, resulted in an unnavigable vessel, and in the latter resulted in death from a collision with a boat.

In the instant case there was no collision or navigational error causing Stacey Grace, a passenger, to be thrown from the boat causing her to be killed by the defective propeller. Instead, it was the defective design of the propeller which is alleged to have caused her death.

Contrary to petitioner's position that the determination of admiralty jurisdiction cannot consider the facts, without an inquiry into facts involving the incident causing injury, there can be no finding as to whether the wrong bears a significant relationship to traditional maritime activity, which is the second prong of the test. To eliminate a case by case inquiry on this question would in effect return the admiralty jurisdiction test to one based on locality only.

The *Sisson* Court examined the type of event in terms of to its relationship to traditional maritime activity. The state court opinion was not based on the absence of negligent navigation, as suggested by OMC. It was based on the relationship to traditional maritime activity.

The state appellate court's characterization of plaintiff's activity as "aquatic recreation involving a pleasure

boat" and the subsequent conclusion that admiralty jurisdiction does not apply due to the lack of a significant relationship to traditional maritime law is congruous with existent federal law and the case does not warrant review by this Court.

III. NON-DEPENDENT SURVIVORS OF A NON-SEAMAN MAY RECOVER LOSS OF SOCIETY DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION.

The state appellate court did not rule on the question of whether loss of society damages were recoverable by a non-dependent parent and sibling under federal maritime law. Thus, it is not a question ripe for review.

However, plaintiff does take exception with OMC's contention that the principles enunciated by this court and consistent lower court authority make it clear that general maritime law bars non-dependent beneficiaries from recovering loss of society damages for the wrongful death of a non-seaman occurring in state territorial waters. (Pet., 20)

A careful review of the relevant case law shows a concerted effort to achieve uniformity between legislative and judicial determinations on what is recoverable in maritime actions involving seamen. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Walker v. Braus and Terra Resources, Inc.*, 1992 WL 115977 (E.D.La. 1992). *Rebstock v. Sonat Offshore Drilling*, 764 F.Supp. 75 (E.D.La. 1991).

Congress has elected to restrict recovery of damages to pecuniary damages in cases involving injuries to seamen, The Jones Act, 46 U.S.C, Section 688, injuries occurring outside state territorial waters, Death on the High Seas Act, 46 U.S.C., Section 761 et seq., and injuries to longshoremen, Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901-950.

Under general maritime law, which is based on common law, there is no such restriction. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 659, 113 S.Ct. 1294, 122 L.Ed.2d 685 (1974). The United States Supreme Court in *Miles*, sought to establish uniformity in recovery by seamen in its decision to prohibit non-pecuniary damages in a seaman's action brought under general maritime law.

The *Miles* decision does not turn on the dependency or non-dependency of the party bringing the action. Under general maritime law there is a split of authority on whether to permit recovery to non-dependent beneficiaries. See *Skidmore v. Grueninger*, 506 F.2d 716, 729 (5th Cir. 1975) (adult child permitted to recovery); *Thompson v. Offshore Co.*, 440 F.Supp. 752 (D.Ct. TX 1977), and *Palmer v. Ribox, Inc.*, 407 F.Supp. 974 (M.D.Fl. 1976) (non-dependent parents permitted to recover).

There has been no pronouncement from the United States Supreme Court limiting recovery in a non-seaman action brought under general maritime law by non-dependent survivors.

Conversely, the Illinois courts have expressly recognized recovery of loss of society damages in state wrongful death actions by non-dependent parents and siblings.

Federal maritime law may be supplemented by non-conflicting state law where there is no express provision governing a specific question. *Green v. Industrial Helicopter, Inc.*, 593 S.2d 634 (La. 1992). Because no conflict exists herein, recovery of loss of society damages by a non-dependent survivor is permissible where a recreational boat passenger is killed in territorial waters of a state that permits such recovery in its wrongful death actions.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied. The judgment in question lacks finality, thereby depriving this Court of jurisdiction to review. Moreover, it represents a proper application of the admiralty jurisdiction analysis established by this Court, which is not in conflict with the decisions of this Court.

Respectfully submitted,

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